

1
2 WATER RIGHTS COMPACT
3
4

5 STATE OF MONTANA
6

7 UNITED STATES OF AMERICA, DEPARTMENT OF AGRICULTURE, FOREST
8 SERVICE
9

10
11 This Compact is entered into by the State of Montana (“State”) and the United States of
12 America (“United States”) to settle for all time any and all claims existing on the
13 Effective Date of this Compact to federal reserved water rights for National Forest
14 System Lands administered by the Forest Service, an agency of the United States
15 Department of Agriculture (“Forest Service”), within the State of Montana.
16

17
18 RECITALS
19

20 WHEREAS, the State of Montana, in 1979, pursuant to Title 85, chapter 2, of the
21 Montana Code Annotated, commenced a general adjudication of the rights to the use of
22 water within the State of Montana, including all federal reserved and appropriative water
23 rights;
24

25 WHEREAS, 85-2-703, MCA, provides that the State may negotiate compacts concerning
26 the equitable division and apportionment of water between the State and its people and
27 the federal government with claims to non-Indian federal reserved water rights within the
28 State of Montana;
29

30 WHEREAS, 85-2-228, MCA, provides that a federal reserved water right with a priority
31 date of July 1, 1973, or later be subject to the same process and adjudication as a federal
32 reserved water right with a priority date before July 1, 1973;
33

34 WHEREAS, the United States wishes to secure water rights to fulfill the purposes of
35 National Forest System Lands in the State of Montana;
36

37 WHEREAS, the United States, in quantifying and securing water rights to meet National
38 Forest System purposes, seeks cooperatively to accommodate the interests of the State
39 and its citizens and to avoid the conflict and uncertainty inherent in litigating federal
40 reserved water rights claims. The United States believes that the natural flows needed for
41 favorable conditions of flow, for fisheries, and for other resource management goals and
42 obligations on National Forest System Lands can be achieved, without materially
43 affecting the interests of the United States, through the use of state law as provided in this
44 Compact;
45

1 WHEREAS, the United States Attorney General, or a duly designated official of the
2 United States Department of Justice, has authority to execute this Compact on behalf of
3 the United States pursuant to the authority to settle litigation contained in 28 U.S.C. §§
4 516 and 517;

5
6 WHEREAS, The Secretary of Agriculture, or a duly designated official of the United
7 States Department of Agriculture, has authority to execute this Compact on behalf of the
8 United States Department of Agriculture pursuant to ___ U.S.C. § ___ (___);
9

10 NOW THEREFORE, the State of Montana and the United States agree as follows:
11

12 13 ARTICLE I

14 15 DEFINITIONS

16
17 For purposes of this Compact only, unless otherwise indicated herein, the
18 following definitions shall apply:
19

20 (1) "Abstracts" means the documents included in Appendix 1 of this Compact, entitled
21 "Abstracts of Forest Service Federal Reserved Water Rights for Current Discrete
22 Administrative Uses," referenced in this Compact as Appendix 1.
23

24 (2) "Concurrently" for the purposes of instream uses means not cumulative to the flow of
25 other instream, non-diversionary water rights on the same reach of stream; and for the
26 purposes of in situ uses means not cumulative to the volume or flow of other in situ, non-
27 diversionary water rights from the same source of water.
28

29 (3) "Department" means the Montana Department of Natural Resources and
30 Conservation or its successor.
31

32 (4) "Discrete Administrative Use" means a federal reserved water right to divert or
33 withdraw water from a source of supply for use authorized under the Organic
34 Administrative Act, 16 U.S.C. § 473, et seq., necessary to fulfill the primary purposes of
35 a National Forest at administrative sites on National Forest System Lands and includes,
36 but is not limited to, federal reserved water rights for the following purposes: water for
37 district offices, ranger stations, guard stations, work centers, and housing; water used for
38 facilities operated for administrative purposes; water used for permanently established
39 tree nurseries and seed orchards; and water for maintaining riding and pack stock used for
40 administrative purposes.
41

42 (5) "Dispersed Administrative Use" means a federal reserved water right to divert or
43 withdraw water from time to time, as needed, from a source of supply for use authorized
44 under the Organic Administrative Act, 16 U.S.C. § 473, et seq., necessary to fulfill the
45 primary purposes of a National Forest within a specified area on National Forest System
46 Lands and includes, but is not limited to, federal reserved water rights for the following

1 purposes: water for dust abatement and road construction; water for prescribed fire
2 management; water for reclamation under the Comprehensive Environmental Response,
3 Compensation, and Liability Act, 42 U.S.C. § 9601, et seq., or other federal laws; water
4 used to establish vegetation; water used temporarily for establishment of nursery stock
5 and seed orchards; and water for other incidental administrative purposes.
6

7 (6) "Effective Date of this Compact" means the date of the ratification of the Compact by
8 the Montana legislature, written approval by the United States Department of
9 Agriculture, or written approval by the United States Department of Justice, whichever is
10 later.
11

12 (7) "In situ" means water with a surface expression used in the place of its natural
13 occurrence and without need of a diversion structure, measured as a flow, level, or
14 volume of water.
15

16 (8) "National Forest System Lands" means all lands within Montana that are owned by
17 the United States and administered by the Secretary of Agriculture through the Forest
18 Service, but does not include any lands within the exterior boundaries of National Forest
19 System units that are not owned by the United States and administered by the Secretary
20 of Agriculture through the Forest Service. This definition applies to Title 85, MCA.
21

22 (9) "Parties" means the State and the United States.
23

24 (10) "Person" means an individual, association, partnership, corporation, state agency,
25 political subdivision, or any other entity, but does not include the United States.
26

27 (11) "South Fork Flathead Wild and Scenic River" means the segment of the South Fork
28 of the Flathead River from its origin to Hungry Horse Reservoir located in Montana that,
29 pursuant to the Wild and Scenic Rivers Act, 16 U.S.C. § 1271, et seq., was designated as
30 a component of the National Wild and Scenic Rivers System by Public Law 94-486, 16
31 U.S.C. § 1274(a)(13), on October 12, 1976.
32

33 (12) "State" means the State of Montana and all officers, agents, departments, and
34 political subdivisions thereof. Unless otherwise indicated, for purposes of notification or
35 consent, "State" means the Director of the Montana Department of Natural Resources and
36 Conservation or the Director's designee.
37

38 (13) "United States" means the United States of America and all officers, agencies,
39 departments, and political subdivisions thereof. Unless otherwise indicated, for purposes
40 of notification or consent other than service in litigation, "United States" means the
41 Secretary of the Department of Agriculture or the Secretary's designee.
42

43 (14) "Water Right Recognized Under State Law" means a water right or use created and
44 administered under Montana law and includes all Forest Service water rights created in
45 Article V of this Compact and state water reservations granted, but does not include a
46 federal or tribal reserved water right recognized by the State.

1
2 (15) “Wetted Perimeter Methodology” means an instream flow methodology for
3 fisheries flow based on habitat for food production in the shallow, fast-moving water of a
4 stream. The wetted perimeter is the distance across the bottom and sides of a stream
5 channel, measured at a riffle area, that is in contact with the water. A graph of the wetted
6 perimeter versus discharge generally yields two inflection points. The upper inflection
7 point of the graph is the level above which large increases in discharge result in a small
8 increase of the wetted perimeter. The lower inflection point of the graph is the level
9 below which small decreases in discharge result in large decreases of the wetted
10 perimeter.
11
12
13

14 ARTICLE II

15 FEDERAL RESERVED WATER RIGHTS

16
17
18 The Parties agree that the following water rights are the federal reserved water rights of
19 the United States for the National Forest System Lands.
20

21 A. Discrete Administrative Uses on National Forest System Lands.

22
23 The United States has federal reserved water rights for current and future Discrete
24 Administrative Uses on National Forest System Lands, subject to the terms of Article III
25 of this Compact:
26

27 1. Current Discrete Administrative Uses on National Forest System Lands.

28
29 The United States has federal reserved water rights for current Discrete
30 Administrative Uses on National Forest System Lands as set forth in Table 1 and
31 the specific listing and Abstracts attached to this Compact as Appendix 1.
32

33 2. Future Discrete Administrative Uses on National Forest System Lands.

34
35 The United States has federal reserved water rights for future Discrete
36 Administrative Uses on National Forest System Lands as set forth in Table 1.
37

38 B. Dispersed Administrative Uses on National Forest System Lands.

39
40 The United States has federal reserved water rights for Dispersed Administrative Uses on
41 National Forest System Lands, subject to the terms of Article III of this Compact, as set
42 forth in Table 1. The period of use for Dispersed Administrative Uses on National Forest
43 System Lands can be for any period throughout the year.
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46

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Table 1

| | | | DISCRETE ADMINISTRATIVE USES | | | DISPERSED ADMINISTRATIVE USES |
|--------------------|--------------------------|-----------------------------------|------------------------------|-------------------|------------------|-------------------------------|
| MT ADJ BASIN | PRIORITY DATE | NATIONAL FORESTS | CURRENT (AF/YR) | FUTURE (AF/YR) | TOTAL (AF/YR) | VOLUME (AF) |
| 39E | 1906-09-24 | CUSTER | 0.00 | 2.00 | 20.. | 12.2 |
| 39F | 1906-09-24 | CUSTER | 0.25 | 2.00 | 2.20 | 11.9 |
| 39FJ | 1906-11-05 | CUSTER | 0.00 | 2.00 | 2.00 | 5.5 |
| 40A | 1902-08-16 1906-08-10 | LEWIS & CLARK GALLATIN | 1.36 | 2.00 | 3.36 | 90.0 3.3 |
| 40B | 1906-11-05 | LEWIS & CLARK | 0.00 | 2.00 | 2.00 | 5.5 |
| 40C | 1906-11-05 | LEWIS & CLARK | 0.00 | 2.00 | 2.00 | 2.7 |
| 41A | 1906-11-05 | BVRHEAD– DEERLODGE | 2.25 | 2.25 | 4.50 | 121.0 |
| 41B | 1906-11-05 | BVRHEAD– DEERLODGE | 1.50 | 2.00 | 3.5 | 42.9 |
| 41C | 1906-11-05 | BVRHEAD– DEERLODGE | 11.44 | 11.44 | 22.88 | 70.9 |
| 41D | 1906-11-05 | BVRHEAD– DEERLODGE | 113.95 | 49.27 | 163.22 | 310.6 |
| 41E | 1906-04-12 1905-05-12 | BVRHEAD– DEERLODGE HELENA | 0.00 | 2.00 | 2.00 | 85.5 1.2 |
| 41F | 1902-08-16 1902-08-16 | BVRHEAD– DEERLODGE GALLATIN | 15.07 | 15.07 | 30.14 | 98.5 69.5 |
| 41G | 1906-04-12 | BVRHEAD– DEERLODGE | 2.50 | 2.50 | 5.00 | 81.8 |
| 41H | 1906-03-07 | GALLATIN | 15.62 | 15.62 | 31.24 | 147.6 |
| 41I | 1905-10-03 1905-10-03 | GALLATIN HELENA | 4.82 | 4.82 | 9.64 | 15.4 169.3 |
| 41J | 1905-10-03 1906-11-06 | HELENA LEWIS & CLARK | 5.51 | 5.51 | 11.02 | 36.0 102.3 |
| 41K | 1897-02-22 | LEWIS & CLARK | 6.63 | 6.63 | 13.26 | 44.8 |
| 41M | 1897-02-22 | LEWIS & CLARK | 3.01 | 3.01 | 6.02 | 43.5 |
| 41O | 1897-02-22 | LEWIS & CLARK | 3.75 | 3.75 | 7.5 | 24.4 |
| 41Q | 1902-08-16 | LEWIS & CLARK | 0.82 | 2.00 | 2.82 | 72.1 |
| 41QJ | 1906-11-06 1928-05-17 | LEWIS & CLARK HELENA | 0.00 | 2.00 | 2.00 | 0.8 17.1 |
| 41R | 1903-12-12 | LEWIS & CLARK | 0.00 | 2.00 | 2.00 | 9.5 |
| 41S | 1902-08-16 | LEWIS & CLARK | 3.50 | 3.50 | 7.00 | 96.8 |
| 41U | 1897-02-22 1928-05-17 | LEWIS & CLARK HELENA | 0.01 | 2.00 | 2.01 | 11.2 14.4 |
| 42B | 1907-03-02 | CUSTER | 0.00 | 2.00 | 2.00 | 13.1 |
| 42C | 1907-03-02 | CUSTER | 39.35 | 39.35 | 78.7 | 133.7 |
| 42J | 1907-03-02 | CUSTER | 0.00 | 2.00 | 2.00 | 11.2 |

Table 1 (continued)

| | | | DISCRETE ADMINISTRATIVE USES | | | DISPERSED ADMINISTRATIVE USES |
|--------------------|--|---|------------------------------|-------------------|------------------|-------------------------------|
| MT ADJ BASIN | PRIORITY DATE | NATIONAL FORESTS | CURRENT (AF/YR) | FUTURE (AF/YR) | TOTAL (AF/YR) | VOLUME (AF) |
| 43A | 1906-08-10 | GALLATIN | 1.51 | 2.00 | 3.51 | 43.4 |
| 43B | 1902-09-04 | GALLATIN | 16.32 | 16.32 | 32.64 | 136.1 |
| 43BJ | 1902-09-04 | GALLATIN | 9.64 | 9.64 | 19.28 | 22.5 |
| 43BV | 1902-09-04 | GALLATIN | 0.00 | 2.00 | 2.00 | 8.2 |
| 43C | 1902-09-04 | CUSTER | 3.00 | 3.00 | 6.00 | 34.5 |
| 43D | 1902-09-04 1902-09-04 | GALLATIN CUSTER | 2.25 | 2.25 | 4.50 | 3.4 25.5 |
| 43N | 1906-11-06 | CUSTER | 0.00 | 2.00 | 2.00 | 14.4 |
| 43P | 1906-11-06 | CUSTER | 0.10 | 2.00 | 2.10 | 9.9 |
| 76B | 1906-08-13 | KOOTENAI | 0.02 | 2.00 | 2.02 | 129.1 |
| 76C | 1907-03-02 | KOOTENAI | 1.00 | 2.00 | 3.00 | 110.0 |
| 76D | 1907-03-02 | KOOTENAI | 9.60 | 9.60 | 19.20 | 384.3 |
| 76E | 1905-10-03 1905-10-03 | BVRHEAD– DEERLODGE LOLO | 4.00 | 4.00 | 8.00 | 76.9 52.1 |
| 76F | 1928-05-17 1906-11-06 | HELENA LOLO | 20.39 | 20.39 | 40.78 | 65.9 123.7 |
| 76G | 1906-04-12 1906-04-12 1905-10-03 | BVRHEAD– DEERLODGE HELENA LOLO | 85.75 | 9.75 | 95.50 | 112.3 35.0 17.0 |
| 76GJ | 1905-10-03 | BVRHEAD– DEERLODGE | 0.00 | 2.00 | 2.00 | 51.9 |
| 76H | 1897-02-22 1897-02-22 | BITTERROOT LOLO | 162.82 | 75.00 | 237.82 | 280.2 59.0 |
| 76I | 1897-02-22 | FLATHEAD | 0.02 | 2.00 | 2.02 | 22.3 |
| 76J | 1897-02-22 | FLATHEAD | 4,247.75 | 2.16 | 4249.91 | 120.0 |
| 76K | 1897-02-22 | FLATHEAD | 241.51 | 241.51 | 483.02 | 97.1 |
| 76L | 1907-03-02 1907-03-02 | FLATHEAD LOLO | 0.00 | 2.00 | 2.00 | 3.4 8.5 |
| 76LJ | 1907-03-02 1897-02-22 | FLATHEAD KOOTENAI | 5.78 | 5.78 | 11.56 | 246.4 12.2 |
| 76M | 1906-11-06 | LOLO | 1,000.28 | 335.28 | 1335.56 | 337.9 |
| 76N | 1907-03-02 1907-03-02 | KOOTENAI LOLO | 4.26 | 4.26 | 8.52 | 138.8 168.4 |

1
2 C. Emergency Fire Suppression.
3

4 The use of water for emergency fire suppression benefits the public and is necessary for
5 the primary purposes of the National Forest System Lands in Montana. The United
6 States has a federal reserved water right to divert or withdraw water on National Forest
7 System Lands, with the priority date for each Water Court basin set forth in Table 1 of
8 this Compact, from a stream, lake, or pond, as needed for emergency fire suppression for
9 the benefit of National Forest System Lands, and without a definition of the specific
10 elements of a recordable water right, subject to the terms of Article III. Use of water for
11 emergency fire suppression shall not be deemed an exercise of the United States' federal
12 reserved water rights for Discrete Administrative Uses as described in Article II, section
13 A., or Dispersed Administrative Uses as described in Article II, section B.
14

15 D. South Fork Flathead Wild and Scenic River.
16

17 The United States has a federal reserved water right with a priority date of October 12,
18 1976, for instream flow on the South Fork Flathead River in the amount of the entire flow
19 of the river, less any of the United States' Discrete Administrative Uses as described in
20 Article II, section A., and Dispersed Administrative Uses as described in Article II,
21 section B., provided that the instream flow water right is subordinate to all Water Rights
22 Recognized Under State Law with a priority date before the Effective Date of this
23 Compact. This federal reserved water right ends at the point where the South Fork
24 Flathead River flows into Hungry Horse Reservoir.
25
26

27 ARTICLE III
28

29 IMPLEMENTATION OF FEDERAL RESERVED WATER RIGHTS
30

31 A. Abstracts.
32

33 Abstracts for all the United States' federal reserved water rights for Current Discrete
34 Administrative Use on National Forest System Lands are set forth in Appendix 1. The
35 Parties prepared the Abstracts to comply with the requirements for a final decree as set
36 forth in 85-2-234, MCA, and in an effort to assist the state courts in the process of
37 entering decrees accurately and comprehensively reflecting the rights for current Discrete
38 Administrative Uses as described in this Compact. The rights specified in the Abstracts
39 are subject to the terms of this Compact.
40

41 B. Enforcement and Administration of Federal Reserved Water Rights.
42

- 43 1. When a controversy arises between the United States' federal reserved water
44 rights described by this Compact and another holder of a Water Right Recognized
45 Under State Law, or for enforcement pursuant to Article VIII, section B., when
46 there is a question concerning the use of water on National Forest System Lands

1 under this Compact, the United States, the State, or a holder of a Water Right
2 Recognized Under State Law may petition a court of competent jurisdiction for
3 relief. Resolution of any controversy shall be governed by the terms of this
4 Compact when applicable or, to the extent not applicable, by appropriate federal
5 or state law.
6

7 2. For the purpose of the administration of federal reserved water rights provided
8 for in Article II, the United States agrees that a water commissioner, or other
9 official appointed by a court of competent jurisdiction, may enter National Forest
10 System Lands to collect data, inspect structures for the diversion and
11 measurement of water, and distribute the federal reserved water rights in Article
12 II. The terms of entry or distribution may be limited, as appropriate, by an order
13 of a court of competent jurisdiction. Nothing herein waives the right of the
14 United States, with respect to a specific action or anticipated action by a water
15 commissioner or other official under this subsection, to seek terms of entry or
16 distribution consistent with federal law if in conflict with state law.
17

18 3. The Department may enter National Forest System Lands for which a federal
19 reserved water right is described in Article II for the purposes of data collection
20 on Forest Service water diversions or notice requirements by the United States,
21 pursuant to Article III, section C.3., of this Compact.
22

23 C. Use of Federal Reserved Water Rights.

24

25 1. Federal Reserved Water Rights.

26

27 The rights of the United States described in Article II of this Compact are federal
28 reserved water rights. Non-use of all or a part of the federal reserved water rights
29 described in this Compact shall not constitute abandonment of the right.
30

31 2. Development of Future Discrete Administrative Uses.

32

33 The United States, without prior approval of the Department, may develop a
34 Discrete Administrative Use after the Effective Date of this Compact as described
35 in Article II, section A.2., provided that:
36

37 (a) the purpose of use of the water is for a Discrete Administrative Use as
38 defined in Article I (4) and described in Article II, section A.2.;

39 (b) the quantity of water for Discrete Administrative Uses diverted or
40 withdrawn shall not exceed the total amount as set forth in Article II,
41 Table 1; and
42

43 (c) the use shall not adversely affect a senior Water Right Recognized
44 Under State Law.
45
46

1
2 3. Use of Dispersed Administrative Uses.
3

4 The United States, without prior approval of the Department, may use its federal
5 reserved water right for Dispersed Administrative Uses, as needed, provided that:
6

7 (a) the purpose of use of the water is for a Dispersed Administrative Use
8 as defined in Article I (5) and described in Article II, section B.;

9
10 (b) the total quantity of water for Dispersed Administrative Uses diverted
11 or withdrawn shall not exceed the amount as set forth in Article II, Table
12 1; and
13

14 (c) the Forest Service shall provide notice of a Dispersed Administrative
15 Use as follows:
16

17 (i) for uses of 20,000 gallons or less per day from a single source
18 of supply, no notice is required;
19

20 (ii) for uses greater than 20,000 gallons per day and less than
21 60,000 gallons per day from a single source of supply, a notice
22 must be posted at the site of the diversion or withdrawal for the
23 entire period during which water is being diverted or withdrawn.
24 The notice posted shall be clearly legible and visible and provide
25 information on: source of water; purpose of use; starting and
26 ending date of diversion; place of use; diversion flow rate;
27 maximum volume of water to be diverted or withdrawn per day;
28 and name and contact information for the contractor, the local
29 Forest Service Ranger District, and the local Department Water
30 Resources Regional Office.
31

32 (iii) for uses greater than 60,000 gallons per day from a single
33 source of supply, the local Department Water Resources Regional
34 Office must be notified at least 10 days but not more than 45 days
35 in advance of the initial use of the water. Notification to the
36 Department Water Resources Regional Office must provide
37 information on: source of water; legal description of the point of
38 diversion or withdrawal; place of use; map showing preceding
39 three items; purpose of use; starting and ending date of use;
40 diversion flow rate; maximum volume of water to be diverted or
41 withdrawn per day; and name and contact information for the
42 contractor and the local Forest Service Ranger District. Notice
43 must be posted at the site of the diversion or withdrawal, as
44 provided in Article III, section C.3.(c)(ii).
45

(d) If notified that the diversion or withdrawal for a Dispersed Administrative Use is adversely affecting a senior Water Right Recognized Under State Law, the Forest Service will immediately cease diversion or withdrawal from that source of supply. To resume the diversion or withdrawal, the Forest Service can move the diversion or withdrawal to another source of supply or satisfy the senior user or the Department Water Resources Regional Office Manager that use will not adversely affect the senior user(s).

D. Change in Use of Federal Reserved Water Rights.

1. Discrete Administrative Uses.

The United States, without approval of the Department, may change a Discrete Administrative Use described in Article II, section A., provided that:

(a) the purpose of use of the water remains a Discrete Administrative Use as defined in Article I (4) and described in Article II, section A.;

(b) the quantity of water for Discrete Administrative Uses diverted or withdrawn shall not exceed the total amount as set forth in Article II, Table 1; and

(c) the change shall not adversely affect a Water Right Recognized Under State Law.

2. Dispersed Administrative Uses.

The United States' federal reserved water right to divert or withdraw water for Dispersed Administrative Uses as described in Article II, section B., shall not be changed to any other use.

3. Emergency Fire Suppression.

The United States' federal reserved water right to divert or withdraw water for Emergency Fire Suppression as described in Article II, section C., shall not be changed to any other use.

4. South Fork Flathead Wild and Scenic River.

The United States' federal reserved water right for instream flow for the South Fork Flathead Wild and Scenic River, as described in Article II, section D., shall not be changed to any other use.

1
2 E. Reporting Requirements.
3

- 4 1. The Forest Service agrees to provide a report to the Department on an annual
5 basis, or on a periodic basis agreed to by the Parties, containing information
6 on development of Discrete Administrative Uses, as described in Article III,
7 section C.2., and any change of a Discrete Administrative Use, as described in
8 Article III, section D.1.
9
10 2. Upon request by the Department, the Forest Service shall report to the
11 Department information it has regarding water use for Emergency Fire
12 Suppression, as described in Article II, section C.
13
14 3. For Dispersed Administrative Uses, as described in Article III, section
15 C.3.(c)(ii) and (iii), upon request by the Department, the Forest Service shall
16 provide copies of notice postings for the stream or basin requested.
17
18 4. For Dispersed Administrative Uses, as described in Article III, section
19 C.3.(c)(i), upon request by the Department the Forest Service shall report
20 information it has available. In the event the Department requests additional
21 information for future reports on a stream or basin for enforcement or water
22 distribution purposes, the Forest Service agrees to comply with the request.
23
24

25 ARTICLE IV
26

27 STATE LAW PROVISIONS
28

29 A. Compact Principles.
30

31 In order to promote settlement of issues between the United States and the State, the
32 United States agrees to relinquish any and all claims to federal reserved water rights for
33 instream flows on National Forest System Lands. The State agrees, that in consideration
34 for the United States' agreement not to pursue federal reserved water rights for instream
35 flows on National Forest System Lands, the following principles, subject to the terms of
36 this Compact, shall be included in state law:
37

38 1. Forest Service Water Rights Recognized Under Law Created in This Compact.
39

40 There shall be created by this Compact Water Rights Recognized Under State
41 Law held by the Forest Service as set forth in Article V, Table 2.
42

43 2. State Water Reservation Process.
44

- 45 (a) There shall be a state water reservation process providing a means for
46 the United States to appropriate state law based water rights for a

1
2 minimum instream flow, level, or quality of water that provides an
3 opportunity for hearing and judicial review.
4

5 (i) Any appropriation granted under this process will result in a
6 water right held by the United States that is protectable and
7 enforceable under state law, and shall not be subject to periodic
8 review or reallocation.
9

10 (ii) The date of appropriation for water rights granted under the
11 state water reservation process will be the date of filing of the
12 application for state water reservations, and will be senior in
13 priority to any applications for state water reservations filed after
14 that date.
15

16 (b) The Parties agree that the language of 85-2-316, MCA, on the
17 Effective Date of this Compact and the terms of Article VI of this
18 Compact satisfy the principles in this Article IV, section A.2.
19

20 3. New State Water Reservation Section.
21

22 A new specific procedure in limited circumstances for state water reservations as
23 set forth in Article VI, section B.
24

25 4. Standing.
26

27 In the ongoing statewide adjudication, the United States shall have the right to
28 object, and participate as an objector, to any water right claim for water use or
29 storage on, or water conveyed across, National Forest System Lands. The Parties
30 agree that the language of 85-2-233, MCA, on the Effective Date of this Compact
31 satisfies the principles in this Article IV, section A.4.
32

33 B. State Law Adopted as a Condition Precedent to this Compact.
34

35 Subject to Article VIII, section D., the Parties agree that as a condition precedent to
36 this Compact the following provisions will be adopted as state law:
37

38 1. Sequencing.
39

40 (a) The permitting process for water appropriations under state law, and
41 the permitting for the access and use of National Forest System Lands in
42 relation to water appropriations, will be sequenced to avoid conflict
43 between state and federal permitting.
44
45
46

(b) The applicant is required to show proof of federal authorization before the application for a new appropriation of water or a change of appropriation will be correct and complete when:

(i) a state permit is required prior to a new appropriation of water, including groundwater, or a change of appropriation; and

(ii) a federal authorization is required to occupy, use, or traverse National Forest System Lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water for the appropriation or change of appropriation.

(c) The state permit for a new appropriation shall be subject to any terms, conditions and limitations related to the use of water contained in the required federal authorization.

(d) The Parties agree that the language of 85-2-302, 85-2-310, 85-2-311, 85-2-312, and 85-2-402, MCA, on the Effective Date of this Compact satisfies this condition precedent.

2. Change of Diversionary Use to Instream Flow.

In addition to any other process available under state law, the Forest Service may apply for a change of use from an appropriation to divert or withdraw water on land owned by the United States that is located within or immediately adjacent to the exterior boundaries of National Forest System Lands on the Effective Date of this Compact to an instream flow water right on National Forest System Lands within or immediately adjacent to the exterior boundaries of National Forest System Lands on the Effective Date of this Compact in accordance with procedures required under state law. The Parties agree that the language of [section 2] on the Effective Date of this Compact satisfies the principles in this Article IV, section B.2.

ARTICLE V

WATER RIGHTS RECOGNIZED UNDER STATE LAW

There is created by this Compact appropriations of Water Rights Recognized Under State Law held by the Forest Service for instream flow or in situ use as set forth in this Article V.

A. Water Rights Recognized Under State Law.

Table 2

| WATER RIGHT NUMBER | SOURCE | FLOW RATE (CFS) | LOWER STREAM POINT | | | | UPPER STREAM POINT | | | |
|--------------------------|----------------------------|-----------------------|--------------------|-----|-----|------|--------------------|-----|-----|------|
| | | | | | | QTR | | | | QTR |
| | | | SEC | TWP | RGE | SEC | SEC | TWP | RGE | SEC |
| 41F-30023850 | Horse Creek | 3 | 25 | 10S | 01W | NESE | 29 | 10S | 01W | SWNW |
| 41F-30023851 | Sheep Creek | 4 | 1 | 12S | 02E | SWSE | 20 | 12S | 03E | SWNW |
| 41H-30023852 | East Fork Hyalite Creek | 7 | 23 | 04S | 06E | SWNW | 12 | 05S | 06E | SWSW |
| 41H-30023853 | Hyalite Creek | 28 | 14 | 03S | 05E | SESW | 15 | 04S | 06E | NWSW |
| 41H-30023854 | West Fork Hyalite Creek | 12 | 26 | 04S | 06E | NWNW | 23 | 05S | 06E | NW |
| 41I-30023855 | Beaver Creek | 10 | 19 | 12N | 02W | SWNE | 11 | 12N | 02W | SENE |
| 41J-30023856 | Sheep Creek | 27 | 2 | 12N | 05E | NWSW | 5 | 12N | 06E | SESE |
| 41J-30023857 | Tenderfoot Creek | 15 | 30 | 14N | 05E | NENE | 22 | 14N | 05E | NWSW |
| 41S-30023858 | Dry Wolf Creek | 5 | 28 | 15N | 10E | SWNW | 31 | 15N | 10E | SWSW |
| 41S-30023859 | South Fork Judith River | 3.5 | 1 | 12N | 11E | NENE | 4 | 11N | 11E | SENE |
| 43B-30023860 | Little Mission Creek | 2.5 | 14 | 03S | 11E | NENW | 27 | 03S | 11E | NWNE |
| 43B-30023861 | Pine Creek | 4 | 8 | 04S | 10E | NWSW | 16 | 04S | 10E | NWSW |
| 43B-30023862 | South Fork Deep Creek | 7 | 5 | 04S | 10E | NENW | 14 | 04S | 10E | NWNW |
| 43B-30023863 | Upper Deer Creek | 2 | 13 | 02S | 14E | NENW | 29 | 03S | 14E | SESE |
| 76B-30023864 | North Fork Yaak River | 24 | 15 | 37N | 31W | SWNE | 4 | 37N | 31W | NE |
| 76B-30023865 | Pete Creek | 15 | 5 | 35N | 32W | NENW | 29 | 36N | 32W | SWNW |
| 76B-30023866 | Seventeenmile Creek | 40 | 27 | 34N | 33W | NWSE | 5 | 33N | 32W | NWNW |
| 76B-30023867 | South Fork Yaak River | 19 | 2 | 35N | 32W | NENE | 5 | 34N | 31W | SWSW |
| 76B-30023868 | Spread Creek | 50 | 3 | 35N | 33W | SWSE | 29 | 36N | 33W | SENE |
| 76B-30023869 | West Fork Yaak River | 30 | 32 | 37N | 31W | NWNE | 35 | 37N | 32W | NENE |
| 76C-30023870 | East Fisher | 15 | 31 | 26N | 29W | NWNE | 31 | 26N | 29W | NENE |
| 76C-30023871 | Silver Butte/ Fisher River | 34 | 17 | 26N | 29W | NENE | 35 | 26N | 30W | SENW |
| 76C-30023872 | West Fisher River | 28 | 1 | 26N | 30W | NWNW | 4 | 26N | 30W | SWSE |
| 76D-30023873 | Barron Creek | 2 | 27 | 32N | 29W | SWNW | 21 | 32N | 30W | NW |
| 76D-30023874 | Big Cherry Creek | 40 | 27 | 29N | 31W | SWSW | 3 | 28N | 31W | NENE |
| 76D-30023875 | Big Creek | 19 | 3 | 34N | 29W | NWNW | 34 | 35N | 30W | NWNW |
| 76D-30023876 | Bobtail Creek | 5 | 20 | 31N | 31W | NWSW | 8 | 31N | 31W | NESW |
| 76D-30023877 | Bristow Creek | 12 | 14 | 32N | 29W | NWNW | 8 | 32N | 29W | NESE |
| 76D-30023878 | Callahan Creek | 60 | 24 | 31N | 34W | NWNW | 21 | 31N | 34W | NWSE |
| 76D-30023879 | Canyon Creek | 4 | 22 | 31N | 29W | SWSE | 29 | 31N | 28W | SWSW |
| 76D-30023880 | Cripple Horse Creek | 8 | 2 | 31N | 29W | NESE | 5 | 31N | 28W | SWSW |
| 76D-30023881 | Five Mile Creek | 4 | 17 | 32N | 28W | SWNW | 19 | 32N | 27W | NENE |
| 76D-30023882 | Granite Creek | 21 | 2 | 29N | 31W | NWNW | 5 | 29N | 31W | NESE |
| 76D-30023883 | Libby Creek | 40 | 16 | 28N | 30W | NWNW | 18 | 28N | 30W | SESE |
| 76D-30023884 | Midas Creek | 1.5 | 31 | 28N | 30W | SWNW | 8 | 27N | 30W | SWSE |
| 76D-30023885 | North Fork Big Creek | 14 | 28 | 35N | 30W | SWSE | 31 | 36N | 30W | SWSE |
| 76D-30023886 | Parmenter Creek | 10 | 7 | 30N | 31W | SWNE | 18 | 30N | 32W | SWSW |
| 76D-30023887 | Quartz Creek | 17.5 | 12 | 31N | 32W | SESW | 2 | 31N | 32W | SWNE |
| 76D-30023888 | Ross Creek | 20 | 8 | 28N | 33W | NENE | 17 | 28N | 34W | SWNW |
| 76D-30023889 | South Fork Big Creek | 20 | 33 | 35N | 30W | SENE | 5 | 32N | 30W | NENE |

1
2

Table 2 (continued)

| WATER RIGHT NUMBER | SOURCE | FLOW RATE (CFS) | LOWER STREAM POINT | | | | UPPER STREAM POINT | | | |
|--------------------------|-------------------------|-----------------------|--------------------|-----|-------|------------|--------------------|-----|-----|------------|
| | | | SEC | TWP | RGE | QTR SEC | SEC | TWP | RGE | QTR SEC |
| 76D-30023890 | Therriault Creek | 4 | 3 | 35N | 26W | SWNW | 3 | 35N | 26W | SENW |
| 76D-30023891 | Young Creek | 6 | 17 | 37N | 28W | NESE | 8 | 37N | 29W | SE |
| 76E-30023892 | Middle Fork Rock Creek | 41 | 18 | 04N | 15W | NENE | 25 | 04N | 16W | NWSW |
| | Rock Creek @ Bitterroot | | | | | | | | | |
| 76E-30023893 | Flat | 150 | 7 | 08N | 17W | NWNW | 7 | 07N | 16W | SESE |
| 76E-30023894 | Rock Creek @ Mouth | 250 | 13 | 11N | 17W | SENE | 30 | 11N | 16W | SWNW |
| 76E-30023895 | West Fork Rock Creek | 12 | 35 | 06N | 16W | NESE | 2 | 05N | 17W | NWSW |
| | Clearwater River @ Lake | | | | | | | | | |
| 76F-30023896 | Alva | 13 | 24 | 18N | 16W | SWSE | 24 | 18N | 16W | NWSE |
| 76F-30023897 | Copper Creek | 11 | 26 | 15N | 08W | SENE | 9 | 15N | 08W | NENE |
| 76F-30023898 | Morrell Creek | 12 | 35 | 17N | 15W | SWSE | 1 | 17N | 15W | NESE |
| | North Fork Blackfoot | | | | | | | | | |
| 76F-30023899 | River | 39 | 2 | 15N | 11W | NWNW | 27 | 16N | 11W | NESE |
| 76F-30023900 | Placid Creek | 7 | 13 | 16N | 16W | SWSW | 10 | 16N | 16W | NWNW |
| 76F-30023901 | Poorman Creek | 7 | 8 | 13N | 08W | NWSW | 24 | 13N | 08W | SENE |
| 76G-30023902 | Little Blackfoot River | 17 | 30 | 09N | 06W | NENW | 12 | 08N | 07W | SWNE |
| 76G-30023903 | Schwartz Creek | 10 | 4 | 11N | 17W | NWNW | 8 | 11N | 17W | SESW |
| 76H-30023904 | Lolo Creek | 41 | 29 | 12N | 22W | NENE | 25 | 12N | 23W | NENW |
| 76H-30023905 | South Fork Lolo Creek | 15 | 6 | 11N | 21W | NWNW | 7 | 11N | 21W | NWNW |
| 76J-30023906 | Wounded Buck Creek | 11 | 17 | 29N | 18W | SWNW | 30 | 29N | 18W | SWSW |
| 76K-30023907 | Bond Creek | 6 | 24 | 25N | 18W | NWNW | 17 | 25N | 17W | NWSE |
| 76K-30023908 | Cedar Creek | 7 | 12 | 22N | 18W | NENW | 21 | 22N | 18W | SESE |
| 76K-30023909 | Cold Creek | 22 | 28 | 21N | 17W | SWNE | 33 | 21N | 18W | NENW |
| 76K-30023910 | Elk Creek | 25 | 16 | 20N | 17W | NENE | 23 | 20N | 18W | SENW |
| 76K-30023911 | Goat Creek | 11 | 17 | 23N | 17W | NWSW | 12 | 23N | 17W | NWNE |
| 76K-30023912 | Groom Creek | 2.5 | 12 | 25N | 18W | SWSW | 5 | 25N | 17W | SE |
| 76K-30023913 | Hall Creek | 2.5 | 11 | 25N | 18W | SENE | 11 | 25N | 18W | NENE |
| 76K-30023914 | Lion Creek | 19 | 8 | 22N | 17W | SWNE | 10 | 22N | 16W | NWSW |
| 76K-30023916 | North Fork Lost Creek | 6 | 27 | 25N | 17W | NWSE | 5 | 24N | 16W | NESE |
| 76K-30023917 | Piper Creek | 9 | 8 | 22N | 17W | SWSW | 33 | 22N | 18W | NENW |
| 76K-30023918 | Scout Creek | 1.5 | 12 | 23N | 17W | NWNE | 19 | 23N | 16W | SESE |
| 76K-30023919 | South Fork Lost Creek | 6 | 6 | 24N | 16W | SWSW | 19 | 24N | 16W | NWSE |
| 76LJ-30023920 | Red Meadow Creek | 16 | 7 | 35N | 21W | SWNW | 11 | 35N | 22W | NWNW |
| 76LJ-30023921 | Trail Creek | 37 | 34 | 37N | 22W | SESE | 28 | 37N | 22W | SESW |
| 76M-30023922 | Rattlesnake Creek | 17 | 2 | 13N | 19W | NWNE | 14 | 14N | 18W | NENW |
| 76M-30023923 | Trout Creek | 28 | 23 | 16N | 26W | SWSW | 5 | 15N | 26W | NESW |
| 76N-30023924 | Bull River | 29 | 14 | 28N | 33W | NWNW | 14 | 28N | 33W | NENW |
| 76N-30023925 | Graves Creek | 28 | 36 | 23N | 30W | SWSW | 36 | 23N | 30W | NWNE |
| 76N-30023926 | Trout Creek | 14 | 24 | 24N | 32W | NENE | 28 | 24N | 32W | SWSW |
| 76N-30023927 | Vermilion River | 110 | 14 | 24N | 31W | SWSE | 7 | 24N | 30W | NWSW |
| WATER RIGHT NUMBER | SOURCE | VOLUME AF/YR | SEC | TWP | RANGE | QTR SEC | | | | |
| 76M-30023928 | Shoofly Meadow | 50.75 | 4 | 14N | 17W | SW | | | | |

3

1 B. Priority Date.

2
3 The priority date of each of the Forest Service Water Rights Recognized Under State Law
4 created in Article V, section A., is the Effective Date of this Compact.

5
6 C. Purpose of Use.

7
8 Except for Water Right Number 76M-30023928, the purpose of use of each of the Forest
9 Service Water Rights Recognized Under State Law created in Article V, section A., is
10 fishery. The purpose of use for Water Right Number 76M-30023928, created in Article
11 V, Section A., is wildlife, which includes habitat.

12
13 D. Period of Use.

14
15 The period of use of each of the Forest Service Water Rights Recognized Under State
16 Law created in Article V, section A., is January 1 – December 31.

17
18 E. Administration and Enforcement.

19
20 The Forest Service Water Rights Recognized Under State Law created in Article V,
21 section A., are appropriations under state law and, as such, will be administered by the
22 State and enforced in accordance with state law. The United States, as owner and user of
23 these water rights, is entitled to the same benefits and is subject to the same regulations as
24 all other holders of a Water Right Recognized Under State Law.

25
26 F. Concurrent with Other Instream Flow Uses.

27
28 The Forest Service Water Rights Recognized Under State Law created in Article V,
29 section A., are for instream uses or in situ non-consumptive use, meaning that there is no
30 diversion, impoundment, or withdrawal associated with the use, and the use does not
31 cause a net loss of water in the source of supply. The Forest Service Water Rights
32 Recognized Under State Law created in Article V, section A., shall run Concurrently with
33 other instream flow or in situ rights.

34
35
36 ARTICLE VI

37
38 APPLICATIONS FOR STATE WATER RESERVATIONS UNDER STATE LAW

39
40 A. State Water Reservation.

41
42 The Forest Service may apply for a state water reservation to maintain a minimum flow,
43 volume, level, or quality of water on National Forest System Lands under 85-2-316,
44 MCA, in all basins within the State including basins or subbasins closed to new
45 appropriations on or after the Effective Date of this Compact, subject to the terms of this
46 Compact, for any purpose authorized by federal law applicable to National Forest System

1 Lands. Any purpose authorized by federal law applicable to National Forest System
2 Lands shall be considered a beneficial use under state law for the purposes of this
3 Compact but shall set no precedent as to whether such purposes are beneficial uses under
4 state law outside the terms of this Compact. A state water reservation issued under 85-2-
5 316, MCA, is a Water Right Recognized Under State Law.

6
7 B. Specific Procedure in Limited Circumstances.
8

9 1. For a state water reservation application pursuant to Article VI, section A.,
10 where the purpose of the reservation is to maintain a minimum flow for fish, and
11 the amount requested is based on the Wetted Perimeter Methodology, a correct
12 and complete application shall constitute:

13
14 (a) conclusive evidence of the purpose of the reservation;

15
16 (b) conclusive evidence of the need for the reservation;

17
18 (c) prima facie evidence that the amount requested is accurate and
19 suitable:

20
21 (i) at the lower inflection point of the Wetted Perimeter
22 Methodology; or

23
24 (ii) at the upper inflection point of the Wetted Perimeter
25 Methodology where the purpose of the reservation is for an
26 existing population of bull trout, westslope cutthroat trout,
27 Yellowstone cutthroat trout, Columbia River redband trout, arctic
28 grayling, or any other fish species listed in the future under the
29 Endangered Species Act, 16 U.S.C. § 1531, et seq.; and

30
31 (d) prima facie evidence that the reservation is in the public interest.
32

33 2. For purposes of this Article VI, section B., a correct and complete application
34 shall be substantially in the form attached hereto as Appendix 3. Appendix 3 may
35 be modified at any time by the consent of both Parties and shall not be considered
36 a modification of the Compact.

37
38 3. For the purposes of this Article VI, section B., the Department shall issue a
39 state water reservation unless an objector proves by a preponderance of the
40 evidence:

41
42 (a) that the amount of water under the Wetted Perimeter Methodology
43 was not accurately measured or calculated, that the Wetted Perimeter
44 Methodology could not suitably be applied, or that there is not an existing
45 population of the fish species set forth in Article VI, section B.1.(c)(ii),

1 identified in the application for state water reservation in the stream reach
2 applied for; or

3
4 (b) that, for the public interest, there is a projected water development
5 project that:

6
7 (i) is feasible;

8
9 (ii) is reliably projected to be commenced within ten (10) years or
10 within ten (10) years after a basin closure is removed;

11
12 (iii) the objector has or can reasonably obtain a possessory
13 interest, or the written consent of the Person or Party with the
14 possessory interest, in the property where the water is to be
15 diverted, impounded, stored, transported, and put to beneficial use;

16
17 (iv) the amount of water needed for the project is reasonable;

18
19 (v) water needed for the project is not reasonably available from
20 any other water source;

21
22 (vi) the water needed for the project, based on amount and period
23 of use, would be unavailable if the proposed reservation was
24 granted;

25
26 (vii) the project would not be feasible with water either in a lesser
27 amount or at a different location if the reservation was granted; and

28
29 (viii) the project serves a significant public need.
30

31 4. If the Department determines that proofs under Article VI, section B.3.(a), are
32 met or that proofs for all criteria under Article VI, section B.3.(b), are met, the
33 Department may issue, modify, or deny the reservation or may subordinate the
34 reservation to the actual development of the project identified in Article VI,
35 section B.3.(b).
36

37 5. The applicability of Article VI to any basin or subbasin terminates thirty (30)
38 years after the state court issues a final decree for that water basin under 85-2-
39 234(1), MCA, or thirty (30) years after the Effective Date of this Compact,
40 whichever is later.
41

42 6. Any appeal of an administrative decision under Article VI shall be in state
43 court and shall be filed at the First Judicial District in Helena, and the review shall
44 be conducted according to the procedures for judicial review of contested cases
45 under the Montana Administrative Procedure Act, Title 2, chapter 4, of the
46 Montana Code Annotated.

1
2 7. In any contested case proceeding held under the Montana Administrative
3 Procedure Act, Title 2, chapter 4, of the Montana Code Annotated, pursuant to
4 this Compact, the common law and statutory rules of evidence shall apply only
5 upon stipulation of all parties to a proceeding.
6

7 C. Administration and Enforcement.
8

9 Any state water reservation issued pursuant to Article VI is a Water Right Recognized
10 Under State Law and, as such, will be administered by the State and enforced in
11 accordance with state law. The United States, as owner and user of these water rights, is
12 entitled to the same benefits and is subject to the same regulations of water use as all
13 other holders of a Water Right Recognized Under State Law.
14

15 D. Concurrent with Other Instream Flow Uses.
16

17 Any state water reservation issued pursuant to Article VI is a Water Right Recognized
18 Under State Law for instream uses or in situ non-consumptive uses, meaning that there is
19 no diversion, impoundment, or withdrawal associated with the use, and the use does not
20 cause a net loss of water in the source of supply. Unless otherwise provided in the terms
21 and conditions, a state water reservation issued pursuant to Article VI shall run
22 Concurrently with other instream flow rights.
23

24
25 ARTICLE VII
26

27 GENERAL PROVISIONS
28

29 A. No Effect on Tribal Rights or Other Federal Reserved Water Rights.
30

31 1. The relationship between the water rights of the Forest Service described
32 herein and any rights to water of an Indian Tribe in Montana, or of any federally
33 derived water right of an individual, or of the United States on behalf of such tribe
34 or individual, shall be determined by the rule of priority. The Parties to this
35 agreement recognize that the water rights described in this Compact are junior to
36 any tribal water rights with a priority date before the Effective Date of this
37 Compact, including aboriginal rights, if any, in the basins affected.
38

39 2. Nothing in this Compact may be construed or interpreted in any manner to
40 establish the nature, extent, or manner of administration of the rights to water of
41 any other federal agency or federal lands in Montana other than National Forest
42 System Lands.
43

44 3. Nothing in this Compact may be construed or interpreted in any manner to
45 establish the nature, extent, or manner of administration of the rights to water of
46 any Indian Tribes and tribal members in Montana.

1
2 4. Nothing in this Compact is otherwise intended to conflict with or abrogate a
3 right or claim of any Indian Tribe regarding boundaries or property interests in the
4 State of Montana.
5

6 B. General Disclaimers.
7

8 Nothing in this Compact may be construed or interpreted:
9

- 10 1. as a precedent for the litigation of federal reserved water rights or the
11 interpretation or administration of future compacts between the United States and
12 the State, or between the United States and any other state;
13
- 14 2. as a waiver by the United States of its right under state law to raise objections
15 in state court to individual water rights claimed pursuant to state law on National
16 Forest System Land in the basins affected by this Compact; or any right to raise
17 objections in an appropriate forum to individual water rights subject to a
18 provisional permit under state law, in the basins affected by this Compact;
19
- 20 3. to establish a precedent for other agreements between the State and the United
21 States or an Indian tribe;
22
- 23 4. to determine the relative rights, inter sese, of Persons using water under the
24 authority of state law or to limit the rights of the Parties or a Person to litigate an
25 issue not resolved by this Compact;
26
- 27 5. to create or deny substantive rights through headings or captions used in this
28 Compact;
29
- 30 6. to expand or restrict any waiver of sovereign immunity existing pursuant to
31 federal law as of the Effective Date of this Compact;
32
- 33 7. with respect to federal reserved water rights, to affect the right of the State to
34 seek fees or reimbursement for costs or the right of the United States to contest
35 the imposition of such fees or costs, pursuant to a ruling by a court of competent
36 jurisdiction or Act of Congress;
37
- 38 8. to affect in any manner the entitlement to or quantification of other federal
39 water rights. This Compact is only binding on the United States with regard to
40 the water rights of the Forest Service, and does not affect the water rights of any
41 other federal agency that is not a successor in interest to the water rights subject to
42 this Compact;
43
- 44 9. to prevent the United States from seeking a permit to appropriate water under
45 state law from a source not closed to new permits by law;
46

1 10. to expand or restrict rights of the United States under federal law except as
2 expressly provided in this Compact.

3
4 C. Reservation of Rights.

5
6 The Parties expressly reserve all rights not granted, described, or relinquished in this
7 Compact.

8
9 D. Severability.

10
11 Except as in provided in Article VIII, section C., the provisions of this Compact are not
12 severable.

13
14 E. Multiple Originals.

15
16 This Compact is executed in quintuplicate. Each of the five (5) Compacts bearing
17 original signatures shall be deemed an original.

18
19 F. Notice.

20
21 Unless otherwise specifically provided for in this Compact, service of notice required
22 hereunder, except service in litigation, shall be:

23
24 1. State: Upon the Director of the Department or other officials that the Director
25 may designate in writing.

26
27 2. United States: Upon the Secretary of Agriculture or other officials that the
28 Secretary may designate in writing.

29
30
31 ARTICLE VIII

32
33 FINALITY OF COMPACT AND DISMISSAL OF CLAIMS

34
35 A. Binding Effect.

36
37 1. The Effective Date of this Compact is the date of the ratification of this
38 Compact by the Montana legislature, written approval by the United States
39 Department of Agriculture, or written approval by the United States Department
40 of Justice, whichever occurs later. Subject to Article VIII, section C., once
41 effective, all of the provisions of this Compact shall be binding on:

42
43 (a) The State and a Person or entity of any nature whatsoever using,
44 claiming, or in any manner asserting a right under the authority of the
45 State to the use of water; and
46

(b) Except as otherwise provided in Article VII, section A., the United States and a Person or entity of any nature whatsoever using, claiming, or in any manner asserting a right under the authority of the United States to the use of water.

2. Following the Effective Date of this Compact, this Compact shall not be modified without the consent of both Parties. Unilateral substantive modification of the terms of this Compact by either Party, as determined by a court of competent jurisdiction, shall render this Compact voidable at the election of the other Party.

3. On approval of this Compact by a court of competent jurisdiction and entry of a decree by such court confirming the rights described herein, this Compact and such rights are binding on all Persons bound by the final order of the court.

4. If an objection to this Compact is sustained under 85-2-233, MCA, this Compact shall be voidable by action of and without prejudice to either party.

B. Enforcement of Compact

1. Either Party may seek enforcement of the terms of this Compact in a court of competent jurisdiction, subject to the limitations of remedies provided in Article VIII, section C.

2. Where the enforcement action involves issues of notice or reporting required under Article III, sections C.3.(c) and E., the State shall provide written notice to the Forest Service and allow a reasonable opportunity to resolve the issue prior to filing an enforcement action.

3. Except as provided in Article VIII, section C., the remedy for an action for enforcement of the terms of this Compact shall not include termination of the Compact in whole or in part.

C. Exclusive Remedy for Changes in State Law.

1. For the time period set forth in subsection 11, if the State enacts a law that results in an alleged material impairment of any principle set forth in Article IV, section A.2., A.3., or A.4., the United States may, within 90 days of the effective date of the law, provide notice to the State of the alleged material impairment. If the United States fails to provide notice within 90 days of the effective date of the law, the United States is barred from taking any action under this section regarding alleged material impairment by enactment of the law.

2. Following the receipt of notice provided in subsection 1, the Parties shall meet within 30 days to discuss the alleged material impairment. The Parties may each

1 appoint a negotiator and may utilize a neutral third party to discuss resolution of
2 the alleged material impairment.

3
4 3. If the State does not agree that the legislation has resulted in material
5 impairment within 90 days, or such time as the parties may agree, or if no other
6 alternative resolution has been found, the United States may seek a judgment in a
7 court of competent jurisdiction declaring that the specified act of the Montana
8 legislature has resulted in material impairment of a principle set forth in Article
9 IV, section A.2., A.3., or A.4. The only remedy available under this subsection is
10 a declaratory judgment as to whether or not the change in state law results in a
11 material impairment of a principle set for in Article IV, section A.2., A.3., or A.4.
12 The parties shall jointly request the court to retain jurisdiction through all
13 proceedings under this section.

14
15 4. If the State agrees or if a court finds that changes to state law have materially
16 impaired a principle set forth in Article IV, section A.2., A.3., or A.4., the United
17 States may take no action under subsection 5 until the final adjournment of the
18 next regular session of the Montana legislature. If the material impairment is
19 cured through enacted legislation to the satisfaction of the United States, the
20 United States is barred from taking further action under this section.

21
22 5. If, in the opinion of the United States, the State has failed to enact legislation
23 that cures a material impairment as provided in subsection 4, the United States
24 may initiate severance and termination of portions of the Compact as provided in
25 subsection 8 by sending notice to the State within 90 days from the end of the
26 regularly scheduled legislative session. If this notice is not served within the 90-
27 day period, the United States is barred from severing and terminating portions of
28 the Compact based on material impairment.

29
30 6. If the State has enacted a law to cure the material impairment and the United
31 States does not agree that the material impairment has been cured by the
32 enactment, the State shall have the opportunity within 90 days from receipt of the
33 notice served by the United States to seek a judgment declaring that the specific
34 enactment has cured the material impairment of a principle set forth in Article IV,
35 section A.2., A.3., or A.4., either by:

36
37 (a) invoking any retained jurisdiction of the court; or

38
39 (b) if no court has retained jurisdiction over the dispute, seeking a
40 judgment in a court of competent jurisdiction.

41
42 7. If the State does not file an action within the 90-day period provided in
43 subsection 6, the notice served by the United States becomes effective at the
44 expiration of the 90-day period. If the State files for declaratory judgment and the
45 court finds that legislation enacted by the State cures the material impairment,
46 then the notice served by the United States does not operate to sever or terminate

portions of the Compact under subsection 8. If the court finds that the enacted legislation does not cure the material impairment, the notice served by the United States becomes effective when the court's judgment becomes final either through the exhaustion of all available appeals or the running of the time for taking an appeal.

8. If the United States elects to sever and terminate portions of the Compact under this section, the Parties agree that Article IV, section A.2., A.3., and A.4., and Article VI together and in their entirety are severed from the Compact and all rights and obligations under those provisions are terminated. All other provisions of Compact remain in force and effect. If the portions of the Compact are severed and terminated, the Parties agree that the United States shall retain all water rights contained in Articles II and V and state water reservations granted to the United States prior to severance and termination under this subsection.

9. If the United States severs and terminates portions of the Compact as provided in subsection 8, the United States may file federal reserved water right claims in the state general stream adjudication, in the Montana Water Court or other state court that succeeds to the Montana Water Court's jurisdiction to conduct the general stream adjudication, for instream flow for any stream on which the United State has not been granted a Water Right Recognized Under State Law for an instream flow or an in situ right. The United States shall file all federal reserved water right claims for instream flow with the state court within twelve (12) months after severance and termination of portions of the Compact become effective. The United States agrees that, regardless of the dates of the reservation of the National Forest System Lands for which a federal reserved water right is claimed, the priority date of the federal reserved water right claim will be the Effective Date of this Compact.

10. The remedy provided in this Article VIII, section C., is the exclusive remedy for actions brought as a result of changes to state law that materially impair the provisions of Article IV, section A.2., A.3., or A.4. There is no remedy under this Compact for changes to state law except as applied under this section to Article IV, section A.2., A.3., and A.4., and as provided in Article VIII, section A.2.

11. This section, and the procedure and remedy provided under this section, shall remain in effect for a period of thirty (30) years after the state court issues a final decree for all water basins under 85-2-234(1), MCA, that contain National Forest System Lands. This period of time under this subsection is tolled for any period of time during which state law materially impaired the interest of the United States as agreed to by the State or determined by a court of competent jurisdiction. After this period all rights and remedies under this section terminate.

1 D. Limits on Article IV., Section B.

2 Article IV, section B., is not an enforceable term of this Compact, and changes to the
3 provisions of state law as described in Article IV, section B.1. and B.2. after the Effective
4 Date of this Compact shall not give rise to any cause of action in law or in equity or
5 provide any remedy under this Compact.

6
7 E. State Court Filing.

8
9 Subject to the following stipulations and within one hundred eighty (180) days of the
10 Effective Date of this Compact, the Parties shall submit this Compact to an appropriate
11 state court having jurisdiction over this matter in an action commenced pursuant to 43
12 U.S.C. § 666, for approval in accordance with state law and for the incorporation of the
13 federal reserved water rights described in this Compact into a decree or decrees entered
14 therein. The Parties understand and agree that the submission of this Compact to a state
15 court, as provided for in this Compact, does not expand or restrict the jurisdiction of the
16 state court or expand or restrict in any manner the waiver of sovereign immunity of the
17 United States in the McCarran Amendment, 43 U.S.C. § 666, or other provision of
18 federal law.

19
20 F. Dismissal of Filed Claims.

21
22 At the time the state courts approve the federal reserved water rights described in Article
23 II of this Compact and enter a decree or decrees confirming the rights described, such
24 courts shall dismiss, with prejudice, all of the water right claims specified in Appendix 2
25 of this Compact for National Forest Service Lands. If this Compact fails approval or a
26 federal reserved water right described herein is not confirmed, the specified claims shall
27 not be dismissed.

28
29 G. Consent Decree.

30
31 This Compact may be filed as a consent decree in federal court if it is finally determined
32 in a judgment binding on the State of Montana that the state courts lack jurisdiction over
33 some or all of the water rights described in this Compact. Within one (1) year of such
34 judgment, the United States agrees to commence such proceedings in the federal district
35 court for the District of Montana as may be necessary to judicially confirm the water
36 rights described herein.

37
38 H. Settlement of Claims.

39
40 The Parties intend that the water rights described in this Compact, together with the rights
41 and obligations set forth in Article IV, are in full and final settlement of all federal
42 reserved water right claims filed by the United States or which could have been filed by
43 the United States as of the Effective Date of this Compact for the primary purposes of the
44 National Forest System Lands in the State of Montana. Pursuant to this settlement, the

1 United States hereby relinquishes forever on the Effective Date of this Compact all said
2 federal reserved water right claims.
3

4 I. Defense of Compact.
5

6 The Parties agree to defend the provisions and purposes of this Compact from all
7 challenges and attacks.
8
9

10 IN WITNESS WHEREOF the representatives of the State of Montana and the United
11 States have signed this Compact on the ____ day of ____, 2007.
12
13